

IN THE DISTRICT COURT OF GAGE COUNTY, NEBRASKA

A723
Site: Beatrice FmGP
ID # NEN000704084
Block: 1.0
Other: _____
SRL 10-5-05

CITY OF BEATRICE,

Plaintiff,

v.

AQUILA, INC., PEOPLES NATURAL
GAS COMPANY, a Division of
Utilicorp, and UTILICORP UNITED,
INC.,

Defendants.

Case No. 05-536

COMPLAINT

FILED
In The Office of the Clerk of the District Court
In Gage County, Nebraska

OCT - 5 2005

Sharon H. Wells
CLERK OF THE DISTRICT COURT
DEPUTY

COMES NOW Plaintiff, and for cause of action against the above-named
Defendants, states as alleges as follows:

1. Plaintiff is a Municipal Corporation located in Gage County, Nebraska, organized, existing, and conducting its affairs under and pursuant to the laws of the State of Nebraska.
2. The Defendant, Aquila, Inc., is a Delaware Corporation, registered and authorized to do and doing business in the State of Nebraska.
3. Until 2002 (actual date unknown), the Defendant, Aquila, Inc., was known and did business in the State of Nebraska as Utilicorp United, Inc.
4. At all times relevant to these proceedings, Peoples Natural Gas Company was a division of Defendant Utilicorp United, Inc.
5. The Defendant, Aquila, Inc., is the legal successor in interest to Peoples Natural Gas Company, and Utilicorp United, Inc., and is a proper party Defendant with regard to the relief hereinafter requested and specified.

40254089



SUPERFUND RECORDS

6. This is an action brought by Plaintiff seeking declaratory judgment and related equitable relief in the form of contractual rescission and return, divesting and re-vesting of an interest in real property located in the City of Beatrice, Gage County, Nebraska.

7. The Gage County District Court has jurisdiction of this matter, and over the parties, by reason of the location of the property which is the subject of these proceedings in Beatrice, Gage County, Nebraska, and by reason of completion of the transaction, sought for rescission, in Gage County, Nebraska.

8. Venue in Gage County, Nebraska, in the District Court thereof, is proper as the location of the realty which is the subject of the instant proceedings and the situs of the dispute sought for adjudication.

9. In or about 1995, the Plaintiff was a participant in a certain floodway "Hazard Mitigation Grant" program initiated, funded, and administered through the Federal Emergency Management Agency (FEMA).

10. The purpose of such hazard mitigation program was to purchase and remove structures from the established floodway of the Big Blue River, within the jurisdictional confines of the City of Beatrice.

11. At or about that same time, the Defendant, Peoples Natural Gas, a Division of Utilicorp, was the owner of property located within the floodway of the Big Blue River, which property is known more particularly and legally described as Lots 7, 8, 9, 10, 11 and 12, Block 71, original town, now City of Beatrice, Gage County, Nebraska.

12. The Defendant, Peoples Natural Gas, a Division of Utilicorp, acquired the referenced property by Warranty Deed of conveyance from its predecessor in interest, Arkla, Inc., et al, on the 1st day of February, 1993.

13. The above-referenced property was identified as suitable for purchase under the Floodway Hazard Mitigation Grant program, and upon inquiry, it was determined that Peoples Natural Gas Company, a Division of Utilicorp, as the owner of said property, was willing to sell the property in exchange for payment in an amount equal to the current fair market value thereof, to be determined by appraisal.

14. On January 8, 1996, the Purchase Agreement, which is marked as Exhibit "A", attached hereto, and incorporated herein by this reference, was executed and entered into by and between Peoples Natural Gas, Inc., a Division of Utilicorp, and Plaintiff, City of Beatrice.

15. The Defendant, Peoples Natural Gas, a Division of Utilicorp, was aware of the necessity of the conduct of an appraisal of the subject property in order to determine its fair market value and participated therein, providing inputs and information upon which the appraisal was partially based.

16. Upon the conclusion of appraisal, it was determined that the value of improvements located upon said property was in the amount of Thirty-seven Thousand Five Hundred Five Dollars (\$37,505.00). The value of real estate, upon which said improvements were located, was in the amount of One Thousand Six Hundred Eighty Dollars (\$1,680.00).

17. Pursuant to general conditions and terms as set forth in Exhibit "A", the Plaintiff purchased, and the Defendant, Peoples Natural Gas, a Division of Utilicorp, the

predecessor in interest to Defendant Aquila, Inc., sold to the City the above-referenced property, for the full appraised and agreed value of Thirty-nine Thousand Two Hundred Dollars (\$39,200.00). Said transaction was filed for record in the Registrar of Deeds Office in and for Gage County, Nebraska, on the 4th day of October, 1996.

18. At or about the time that the Defendant, Peoples Natural Gas, a Division of Utilicorp, Inc., negotiated for the sale of the above-referenced property to Plaintiff, the Defendants knew that there were hazardous wastes, chemicals, and environmental contaminants located upon or within the subsurface of the property.

19. The Defendant, Peoples Natural Gas, and Utilicorp, Inc., purposefully failed to disclose, misrepresented, and acted to conceal the existence and extent of their knowledge, as well as the actual nature, extent, and existence of environmental contaminants located upon the property in order to facilitate conclusion of the sales transaction with the Plaintiff and thus avoid direct financial responsibility associated with the presence of the referenced contaminants on its property.

20. The Defendant, Peoples Natural Gas, and Utilicorp, Inc., in making false representations and in failing to disclose and concealing the existence of contaminants and the contaminated condition of the property which it agreed to sell to Plaintiff, intended that the Plaintiff would rely upon such representations and omissions provided by the Defendants and that the failure to make complete and truthful disclosure as to the nature, existence and presence of contaminants on the property would induce the City of Beatrice to conclude transaction for the purchase thereof. The representations, concealment, and failures of disclosure, were fraudulently made and undertaken for the direct purpose of inducing the City of Beatrice to act in reliance thereupon.

21. The Plaintiff did in fact reasonably rely upon the Defendants' misrepresentations, concealment, and failures of disclosure, in general accordance with the Defendants' intentions, to the detriment of the Plaintiff.

22. On May 18, 2005, the Plaintiff, City of Beatrice, was notified by the Environmental Protection Agency, an agency of the United States of America, that it is asserted to be a "Potentially Responsible Party" with regard to the hazardous waste and environmental contamination located upon the property above-referenced, as sold by the Defendants, to Plaintiff.

23. Costs and expenses for which the Plaintiff may be held to account, as a "Potentially Responsible Party", arising solely in consequence of its ownership of the referenced property, when asserted, will be substantial.

24. After purchase by Plaintiff of the referenced property, existing structures previously maintained by the Defendants upon said property, were removed, pursuant to the Floodway Hazard Mitigation Program and parties' express agreement.

25. The Defendant, Peoples Natural Gas, a Division of Utilicorp, by transferring its ownership to the Plaintiff, City of Beatrice, purposefully acted for the purpose and with the actual intent of avoiding those prospective or potential expenses *which are now asserted to be and constitute obligations of the Plaintiff, City of Beatrice.*

26. Because and by reason of the Defendant, Peoples Natural Gas, a Division of Utilicorp's fraud, and Plaintiff's reasonable reliance thereupon, as well as the purposeful nature of the Defendants' actions, intended to avoid or cast off financial obligations justly due and owing by it, Plaintiff asserts that it is entitled to the equitable remedy of rescission of the parties' Purchase Agreement and cancellation of the deed

issued by Peoples Natural Gas, Inc., a Division of Utilicorp, to the Plaintiff, which deed has heretofore resulted in Plaintiff's ownership of said property.

27. The Plaintiff, by this filing, tenders full return and re-conveyance of the property and cancellation of the deed filed for record on October 4, 1996.

28. Plaintiff seeks return of the sum of One Thousand Six Hundred Eighty Dollars (\$1,680.00), being the value paid for the underlying real estate, exclusive of improvements.

29. Plaintiff, by this filing, further abandons all sums paid to the Defendant, Peoples Natural Gas, a Division of Utilicorp, representing the value of buildings and improvements upon such property, so as to facilitate placement of the Defendants, and each of them, and the Plaintiff, in a position of status quo, as existed prior to the transaction complained of, or a reasonable approximation of status quo as is just and equitable under the circumstances.

WHEREFORE, Plaintiff prays Declarations and Orders of Court as follows:

A. Declaring and determining that this Court has jurisdiction over the parties, subject matter, and property which is the subject of the Plaintiff's Complaint;

B. Declaring that the Defendant, Aquila, Inc., is the successor in interest, or the equivalent, of Utilicorp United, Inc., and its division, Peoples Natural Gas, and that Aquila, Inc. is a/the proper Defendant for imposition of relief as herein prayed;

C. Declaring that the Defendant, Aquila, Inc., is responsible for, and may be held to account for, the acts and omissions of Utilicorp United, Inc. and Peoples Natural Gas;

D. Declaring and determining that the Court, in the exercise of inherent powers of equity jurisdiction, maintains authority to grant the Plaintiff's relief as herein requested;

E. Declaring that the Defendants misrepresented, fraudulently concealed and failed to disclose the existence, nature and severity of hazardous waste and environmental contaminations on property sold by the Defendant, to the Plaintiff, pursuant to Plaintiff's Exhibit "A";

F. Determining that the Plaintiff reasonably relied upon the Defendants' fraudulent representations, concealment and omissions, to its detriment;

G. Declaring that by reason of the Defendants' actions, the Plaintiff is entitled to rescind the Purchase Agreement entered into by the parties on January 8, 1996;

H. Declaring that by reason of such contractual rescission and Plaintiff's tender of return of title to the subject property, Plaintiff is entitled to rescind and set aside, void, and nullify the deed of conveyance filed for record on October 4, 1996;

I. Declaring that the Plaintiff has made adequate legal tender of return and that under the circumstances, retention by the Defendants of sums paid for improvements located upon the subject property is adequate to restore the parties to a equitable pre-transaction status quo;

J. Declaring that the Defendant, Aquila, Inc., is the lawful owner of property legally described as Lots 7, 8, 9, 10, 11 and 12, Block 71, original town, now City of Beatrice, Gage County, Nebraska;

K. Declaring and determining that all documents, papers, and other evidences of sale or transfer related to previous sale of the above-referenced property to the City of Beatrice, are null, void, and without effect, ab initio;

L. Determining and adjudging that Plaintiff is entitled to return of the sum of One Thousand Six Hundred Eighty Dollars (\$1,680.00), being that sum of money paid by the Plaintiff, to the Defendant, Utilicorp United, Inc., and Peoples Natural Gas, for the interest in realty acquired, and sought for avoidance, exclusive of buildings or other improvements located thereupon, for which the Defendant has heretofore been paid fair value;

M. Granting such other and further relief as is just and equitable under the circumstances.

CITY OF BEATRICE, Plaintiff

BY: 

K. C. Engdahl #17678
Karisa D. Johnson #22909
Ballew, Schneider, Covatt,
Gaines & Engdahl, PC, LLO
300 Farnam Plaza Building
1625 Farnam Street
Omaha, NE 68102
(402) 934-9499
kc@omahalaw.net

**CITY OF BEATRICE, NEBRASKA
FLOODWAY PURCHASE PROGRAM**

THIS AGREEMENT, hereinafter referred to as "AGREEMENT" is dated this 8th day of January, 1995, by and between PEOPLES NATURAL GAS COMPANY, a division of UtiliCorp United Inc., a Delaware corporation, hereinafter referred to as "SELLER," whether one or more, and the CITY OF BEATRICE, NEBRASKA, hereinafter referred to as "PURCHASER".

SELLER hereby agrees to sell to PURCHASER, and PURCHASER hereby agrees to purchase from SELLER, certain real property upon the following terms and conditions:

1. The Property. The property of SELLER to be sold to PURCHASER pursuant to this AGREEMENT consists of the marketable fee simple title to land, including all improvements, in Gage County, Nebraska, described as follows, to-wit: the parcel of land in Gage County, Nebraska, described in the legal description attached hereto, but subject to modification after the final survey, and incorporated herein by reference as Exhibit "A", hereinafter referred to as "PROPERTY".

2. Price. The purchase price which PURCHASER agrees to pay to SELLER for the PROPERTY is the sum of Thirty-Nine Thousand Two Hundred Dollars (\$39,200.00), subject to adjustment by the Federal Emergency Management Agency to avoid duplication of Federal benefits, and subject to the final survey, provided, however, that PURCHASER's obligation to purchase the PROPERTY for such purchase price pursuant to this AGREEMENT shall be contingent upon the availability of Federal funds to finance the transaction described in this AGREEMENT.

3. Payment. The purchase price for the PROPERTY shall be paid by PURCHASER to SELLER at the time of closing, by PURCHASER's bank check.

4. Deed. The PROPERTY shall be conveyed by SELLER to PURCHASER by Full Warranty Deed free and clear of all leases, mortgages, liens (including real estate taxes) and other encumbrances, except easements and protective covenants now of record, such excepted items hereinafter being referred to collectively as "PERMITTED EXCEPTIONS".

5. Title Insurance. As soon as practicable after the date of this AGREEMENT, the PURCHASER shall deliver to the SELLER a commitment for a title insurance policy for the PROPERTY.

(a) Such commitment shall be issued by an authorized company in the amount of the purchase price and shall show marketable fee simple title to the PROPERTY to be vested in the SELLER, subject only to the PERMITTED

may be removed by the payment of money at the time of closing and which the SELLER may so remove at that time by using a portion of the purchase price to be paid at closing, including deposit of same for SELLER's account with the title insurer pursuant to a "title indemnity" or similar escrow arrangement pending removal or release of such liens or encumbrances. The aforesaid policy or commitment shall be conclusive evidence of good title as therein shown as to all matters insured or to be insured by the policy, subject only to the exceptions as therein stated.

(b) If the aforesaid commitment discloses any exceptions to title, hereinafter referred to as NONPERMITTED EXCEPTIONS, other than the PERMITTED EXCEPTIONS, the SELLER shall have 30 days from the date of delivery of the commitment to the SELLER to have the NONPERMITTED EXCEPTIONS removed from the policy or commitment, or, at SELLER's expense, to have the title insurer commit to insure against loss or damage that may be occasioned by such NONPERMITTED EXCEPTIONS, and in such event, the time of closing shall be the day following the date of such removal of exceptions or commitment to insure, or the date for closing as provided pursuant to Paragraph 8 hereof, or seven (7) days following the receipt by the PURCHASER of the Federal grant referred to hereinabove, whichever occurs later.

(c) If SELLER fails to have the NONPERMITTED EXCEPTIONS removed, or in the alternative, to obtain the commitment for title insurance specified above as to such exceptions within the specified time, PURCHASER may, at PURCHASER's election, terminate this AGREEMENT as to all of the PROPERTY or take title as it then is, in either case by giving the SELLER written notice of PURCHASER's election and, in the latter case, by tendering performance on PURCHASER's part. If PURCHASER fails to give notice of such election within ten days after the expiration of the aforesaid 30 days, then PURCHASER shall be deemed to have elected to take title as it then is, and this transaction shall close in accordance with the preceding provisions hereof. If PURCHASER shall give notice of PURCHASER's election to terminate this AGREEMENT, as aforesaid, within the time provided, then this AGREEMENT shall thereupon, without further action by any party, become null and void and neither party shall have any obligation hereunder.

6. Surveys. All surveys which the PURCHASER may require in connection with the closing of this transaction shall be at the expense of PURCHASER.

7. Eminent Domain. It is agreed among the parties that this AGREEMENT is entered into voluntarily, SELLER having been informed that this is a voluntary program and that PURCHASER will not use its power of eminent domain (condemnation) to acquire the PROPERTY.

8. Closing. This transaction shall be closed on or before August 14, 1996. The transaction shall be closed at the address of the PURCHASER, set out below, or at such other place as may be agreed upon by SELLER and PURCHASER.

All taxes relating to PROPERTY must be paid out prior to closing and SELLER shall provide proof of payment at closing. Between the date when this AGREEMENT is fully executed and the date of closing, SELLER assumes all risk for destruction of or damage to PROPERTY, and SELLER agrees that the purchase price set forth in Paragraph 2 above may be adjusted, at PURCHASER'S sole discretion, according to the damage or destruction sustained.

9. Delivery of possession. Possession of the PROPERTY shall be delivered to PURCHASER at closing subject to the PERMITTED EXCEPTIONS, or at such subsequent time as may be agreed upon in writing by SELLER and PURCHASER. Prior to possession, PURCHASER may enter the PROPERTY from time to time for the purpose of performing such tests, inspections and surveys as the PURCHASER deems necessary.

10. Revenue Stamps. All documentary stamp taxes shall be paid by PURCHASER to the extent that this transaction is not exempt therefrom.

11. Assignment. This AGREEMENT, and/or any interest of SELLER hereunder, may not be assigned in whole or in part by the SELLER without the prior written consent of the PURCHASER.

12. Recordation. This AGREEMENT may be recorded in whole or in part.

13. Entire Agreement. This AGREEMENT contains the entire agreement between the parties, and SELLER agrees that neither the PURCHASER, nor any of its officers, agents, or employees, have made any representation or promise with respect to, or affecting the PROPERTY or adjoining real estate, or this AGREEMENT, not expressly contained herein.

14. Governing law. The provisions of this AGREEMENT shall be governed by, and construed in accordance with, the laws of the State of Nebraska.

15. Captions. The captions contained in this AGREEMENT are for convenience only and are not intended to limit or define the scope or effect of any provision of this AGREEMENT.

16. Time. Time is of the essence of this AGREEMENT.

17. Default: specific performance. If SELLER shall default hereunder, PURCHASER shall be entitled to enforce specific performance of this AGREEMENT or may terminate this AGREEMENT, at PURCHASER's option.

18. Notices. All notices herein required shall be in writing and shall be served on

18. Notices. All notices herein required shall be in writing and shall be served on the parties at the addresses set out below, or at such other address as either party may hereafter designate in writing for service of notice to itself. The mailing of a notice by certified or registered mail, return receipt requested, or delivery thereof by messenger, shall be sufficient service.

19. Survival of conditions. The terms and conditions of this AGREEMENT, and all representations, covenants, warranties, and agreements herein, shall survive the closing of this transaction, and shall not be deemed to have merged or terminated upon closing.

20. Binding effect. The provisions of this AGREEMENT shall inure to the benefit of, and shall be binding upon, the successors in interest and assigns of the respective parties hereto.

21. Salvage. After the execution of this AGREEMENT and before closing, SELLER shall have the right, at SELLER'S cost, to remove from the property and convert to SELLER'S own use any and all personal property on the PROPERTY, including contents of structures and fences. Until the closing, SELLER shall bear the risk of loss of all structures or other improvements on the PROPERTY and shall have an insurable interest therein. SELLER shall not commit waste as to any structure or improvement on the PROPERTY. Any partial salvage of a building or other structure on the PROPERTY by SELLER shall be done in a good and workmanlike manner so as not to impair the structural integrity of the building or structure. Any doors or windows which are removed from any structure shall be boarded up so as to prevent entry into the structure. The PROPERTY shall be left by SELLER in good and clean condition. SELLER agrees to hold harmless and defend PURCHASER from any and all claims, actions, or damages resulting from SELLER'S salvage as described herein.

Simultaneously with the signing of this AGREEMENT, SELLER shall submit to PURCHASER for PURCHASER'S approval a detailed plan outlining SELLER'S salvage plan. The proposed plan shall include a list of what is to be salvaged. As soon as salvage is completed according to the approved plan, SELLER shall notify Kirkham, Michael and Associates, Inc., and an agent will conduct an inspection of the PROPERTY prior to closing.

SELLER(s):

X Timothy Bunker

X _____

CITY OF BEATRICE

PURCHASER

205 North 4th Street

Beatrice, NE 68310-0279

By [Signature]

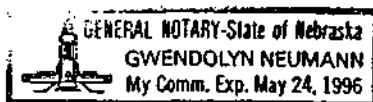
STATE OF NEBRASKA)

COUNTY OF Lancaster)

) ss.

On this 7th day of January, 199⁶, before me, a Notary Public in and for said County, personally came the above named PEOPLES NATURAL GAS COMPANY, a division of UtiliCorp United Inc., a Delaware corporation, SELLER, and acknowledged the execution of the above Purchase AGREEMENT as his/her voluntary act and deed.

WITNESS my hand and Notarial Seal the date last aforesaid.



Gwendolyn Neumann
Notary Public

EXHIBIT "A"

LOTS SEVEN (7), EIGHT (8), NINE (9), TEN (10), ELEVEN (11), AND TWELVE (12),
BLOCK SEVENTY-ONE (71), ORIGINAL TOWN, NOW CITY OF BEATRICE, GAGE
COUNTY, NEBRASKA.